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Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,
Petitioners

v.

A.H. ROBINS COMPANY, INCORPORATED, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF 18,136 DALKON SHIELD CLAIMANTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a corporate reorganization filed under the bankruptcy code to resolve mass tort product liability claims, where a consensual plan provides for full payment of all claims and a trust fund is judicially determined to be adequate for that purpose, a determination not appealed, may a challenge be heard to an injunction prohibiting claims against certain alleged joint tortfeasors, where the challenge rests on a contrary assumption that the fund will not be adequate?

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INTEREST OF THE AMICUS CURIAE

This opposition brief is filed on behalf of approximately 18,136 individuals who are qualified claimants in the A.H. Robins Company bankruptcy proceeding[1], asserting that each suffered personal injury from use of Robins' product, the Dalkon Shield intrauterine device. Since the Robins plan of reorganization approved by the district court will establish a trust fund of more than $2.375 billion to compensate these victims for their injuries, they have a direct and immediate

[1]The 18 attorneys and law firms who have agreed to sign this brief and whose names appear on its cover together represent more than 18,136 Dalkon Shield claimants residing in more than 20 nations, and have filed appropriate appearances either with the court below or with the Dalkon Shield Claimants Trust. In addition, those attorneys have been authorized to speak on behalf of approximately 1000 unrepresented members of the Dalkon Shield Victims' Association, Inc.

interest in final resolution of this proceeding, which has already delayed payment of their claims for more than four years.

By contrast, the petition for certiorari has been filed on behalf of only 669 individuals having similar claims, part of the small minority of disgruntled claimants who presumably voted against the consensual plan of reorganization in July 1988. Your *amicus curiae*[2] is part of the 94.3% of the Dalkon Shield claimants who voted in favor of the plan.

SUMMARY OF ARGUMENT

The overwhelming majority of the Dalkon Shield victims are not concerned about their theoretical right to sue some possible joint tortfeasor, nor even concerned about a possible "shortfall" in a trust fund of $2.375 billion established for their benefit. They seek to be compensated promptly for their injuries from the funds set aside for that purpose.

Greater than the risk of a shortfall is the immediate risk—a near certainty—that if the plan of reorganization is disapproved or even delayed further by a grant of certiorari, the offer to purchase the stock of Robins will be withdrawn, the plan will collapse, and the issue will become moot.

The issue of adequacy of the fund has not been properly preserved on appeal, and the record below provides no sufficient or useful basis for the Court to elucidate the issue presented by petitioners.

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[2]Consent to file as *amicus curiae* pursuant to Supreme Court Rule 36.1 has been secured in writing (filed with the Clerk of Court) from counsel of record for petitioners and for Robins, and verbally from counsel for the other respondents.

ARGUMENT

I.

The Robins Plan of Reorganization Is Acceptable to Nearly All of the Tort Claimants As A Reasonable Vehicle to Achieve Fair Compensation Without Undue Further Delay

The Robins plan of reorganization, while not perfect, has found overwhelming acceptance of all committees and of the primary parties to the bankruptcy as a means to preserve the corporation while assuring payment in full to the thousands of victims of the Dalkon Shield. The "claims resolution facility," the vehicle contained in the plan for ultimate disposition of thousands of personal injury claims, is largely the creature of the Dalkon Shield Claimants Committee constituted by the district court to represent the interests of all the IUD victims.

The small group of disenchanted claimants who seek to continue their challenge to the plan by petition to this Court would upset that careful scheme of mass claims resolution. If successful, they would cause incalculable further delay in disposition of the claims, and perhaps cause the return of tens of thousands of outstanding claims to courts throughout the United States and the world for disposition by individual trials.[3]

This brief *amicus curiae* is filed on behalf of the large majority of claimants who recognize that any plan of reorganization acceptable both to victims of the Dalkon Shield and to the

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[3]The petitioners are represented primarily by those few attorneys who have opposed the Robins bankruptcy from its inception in 1985, preferring to litigate individual claims in the courts in quest of substantial punitive damages. Although the present brief for practical purposes is signed only by attorneys each representing more than 150 claimants, there are nearly 10,000 additional attorneys who each represent one or a few clients, most of whom similarly view the bankruptcy plan as an appropriate tool for fair claims resolution and have chosen not to appeal.

financial and corporate community requires compromise. They are willing to give up a theoretical claim which might permit them to continue the litigation against some individuals and entities not truly central to the Robins liabilities[4] in return for assured—and prompt[5]—resolution of their claims under a program of alternate dispute resolution that appears to be fair and workable. Under the plan of reorganization, they will be able to proceed not only against the Dalkon Shield Claimants Trust, but should that fund prove inadequate (contrary to strong evidence), may also have some benefit from a separate fund of as much as $350 million to be established by Robins' insurer, Aetna Casualty and Surety Company.[6]

Significantly, the opponents of this plan of reorganization have *never* suggested an alternative plan which would promise a greater prospect of recovery. It is unrealistic to the point of absurdity to expect that tens of thousands of individual claimants, should this plan be upset, might pursue a potential

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[4]The plan does preserve certain rights against Robins' insurer (see Note 6, *infra*) and entails contributions from some corporate officers. It also perpetuates the right to sue physicians for independent medical malpractice. It only "channels" against the trust fund those claims which might give rise to a justified quest for indemnity from the bankrupt corporation.

[5]A number of the claimants have special need to conclude these proceedings promptly, since the "biological clock" is ticking on their infertility. They require early settlement of their claims in order to pay for restorative gynecological surgery or *in vitro* fertilization, which cannot be performed after a certain age. An emergency fund to be established for that purpose in 1987 was blocked on a prior appeal. 832 F.2d 299 (4th Cir. 1987), *cert. denied* 108 S. Ct. 1228 (1988).

[6]Settlement of the related Aetna class action is subject of a separate petition for certiorari (October Term, 1989, No. 442, *sub nom. Alexia Anderson, et al v. Aetna Casualty and Surety Company, et al*). Under the terms of the Robins plan, the Aetna class action settlement may be vacated without upsetting the viability of the plan or its claims resolution mechanism. Indeed, many of the signatories to this *Amicus Curiae* Brief support the petition for certiorari filed on behalf of Anderson, *et al.*

remedy in their local courts against the alleged joint tortfeasors.[7]

The majority of Dalkon Shield claimants opposing certiorari recognize a substantial risk that if the petition is granted, not only will they suffer further delay and further loss of interest on the trust funds (a loss estimated at nearly $20 million per month—more than $300 million since July 1988) but in all likelihood, they will lose the plan and the trust altogether. American Home Products has extended to December 31, 1989, its conditional commitment to purchase the stock of A.H. Robins Company for $3.2 billion. This purchase offer *exceeds* the value of Robins by any estimate.[8] It seems unlikely that the purchaser will tolerate the further delays and uncertainties of certiorari[9]; and therefore even should this Court affirm at some later date, the Robins plan is likley to be mooted before this Court has opportunity to consider its merits.[10] In that event, the claimants who have waited so long for compensation will certainly wait several more years, and most likely receive *less* compensation.

The overwhelming majority of claimants have stated their election to trade their uncertain opportunity to litigate in the

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[7]As *none* did prior to the bankruptcy; see Part III *infra*.

[8]This results from American Home's large cash surplus and the shelter of its income under the U.S. Tax Code.

[9]It was clear in the record below that the plan of reorganization was a unitary and non-severable whole. American Home Products would not have agreed to purchase the stock of Robins without an agreement to end all litigation by channeling all Dalkon Shield claims to the Trust for payment.

[10]The injunction at issue here remains a condition to the purchase agreement for Robins stock. If the purchase fails, Robins will again attempt "stand-alone" financing or experience liquidation, either of which almost certainly will bring less for the claimants and other creditors, after long delay, than is provided in the present plan.

future against some potential third parties for the certainties of what appears after adequate disclosure to be a good plan of reorganization and compensation. They entreat the Supreme Court to deny certiorari and permit the plan to proceed.

II.

Both From the Standpoint Of The Record Below, And From Developments Following Estimation, The Adequacy of the Fund is Undisputed.

Central to the contentions of the petitioners is a disputation over the adequacy of the fund of $2.375 billion to be made available under the Robins plan of reorganization from the American Home purchase. However, that issue has not previously been pressed on appeal, and is not properly before this Court.

In 1987 the district court conducted an estimation of claims under section 502(c) of the bankruptcy code (11 U.S.C. § 502(c)) and determined that at most, the Dalkon Shield claims had an aggregate settlement value of $2.475 billion based on the "historical value" of each claim. A random sampling of more than 6,000 claims had been carefully investigated and analyzed under the supervision of the court's special master, and expert witnesses were engaged by each of the parties to estimate the total value.

Following a week-long hearing in November 1987, the lower court expressly discounted the high estimate of approximately $7 billion proffered by the Claimants Committee as resting on faulty methods including an invalid assumption that all claims would be found equally meritorious, and rejected a low estimate of claims prepared by an expert for Robins. From the analyses prepared by each of the experts taken together, the trial court

concluded that $2.475 billion would suffice to pay all of the qualified Dalkon Shield victims "in full."[11]

Although voluminous evidence is available in the record from multiple parties and witnesses, the petitioners have not challenged the basis for the court's estimation, in this or any other forum. Instead, they continue to ground their challenge to the approved plan on speculation or unsubstantiated assertions that the "fund may well be inadequate" to pay the claimants in full. (Petition, p.3).[12]

Not only have the petitioners failed to challenge the court's express determination which undergirds their contentions, but subsequent events seem to have proven that their misgivings were unwarranted. The estimation experts (other than those called by the Claimants Committee) expressed an opinion that a significant portion of the original 330,000 Dalkon Shield claims would be found invalid or of minimal value. As of today, more than 135,000 of the claims have been disallowed and another 80,000 claimants have voluntarily accepted a "nuisance value" offer of a maximum of $725 to resolve their claims.[13] A third group of claims has been judged fatally deficient; and by the present projection of the Dalkon Shield Claimants Trust, less than 95,000 claims (or 28% of those filed in 1986) will remain

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[11]The trial judge repeatedly made it clear that his estimate of $2.475 million payable over a reasonable period of time (since converted by agreement to $2.375 billion payable by American Home immediately upon consummation) was the ***highest*** amount required to satisfy the Dalkon Shield claims consistent with credible evidence, and that all "risk" associated with the estimation itself would fall on the Robins Company, who subsequently was compelled to create a non-reversionary fund for the claimants.

[12]Indeed, the potential inadequacy of the fund is expressly posited as a component of the "question presented" in the petition.

[13]The court required Robins to provide funds to the Dalkon Shield Claimants Trust to resolve these small claims while appeals are pending from approval of the plan itself.

for analysis of medical records to determine what smaller portion will merit significant compensation.[14]

In short, the trial court's original estimate is looking better and better, and the fears of the alarmist minority first voiced when 330,000 claims were registered have already proven largely illusory.

Your *amicus curiae* has an interest equal to (or numerically far greater than) that of petitioners, to be assured that the victims' trust be adequate to provide full compensation to tens of thousands of remaining claimants. Undersigned counsel may have better information founded on representation of a significant number of individuals (a large percentage of the more serious claimants who have sought counsel). There is presently more reason than ever to believe that the valid claims will not likely "break the bank" but rather that a portion of the $2.375 billion fund may well remain for *pro rata* distribution (in lieu of punitive damages) under the terms of the claims resolution facility, after consideration and payment of all valid claims.

Petitioners complain that the "entire risk" of a shortfall in funding has been assumed by the Dalkon Shield victims under the agreed and approved plan. By their failure to appeal the court's finding that funding is sufficient, however, they cannot establish the magnitude nor even the fact of a supposed shortfall. The overwhelming majority of claimants—with their eyes open—prefer to face that "risk" rather than the certainty of continued delay, and the high probability that after that delay, no alternative plan will surface to provide better compensation for the victims of the Dalkon Shield than the existing consensual plan.

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[14]Some of these developments occurred after the district court confirmed the plan in July 1988 and may not be part of the record below.

III.

The Injunction Issue Does Not Present a Conflict Between the Circuits; and the Undeveloped Record in This Case Is a Poor Basis for Consideration of That Issue.

The sole issue raised in petitioners' brief involves the prohibition by the district court, continued in the plan of reorganization, barring Dalkon Shield victims who participate in the bankruptcy from claiming damages for the same injuries from possible third-party tortfeasors, specifically, from the officers and directors of A.H. Robins Company, from its attorneys and related parties.

The legal merits of this contention will be addressed in the briefs of the respondents. Suffice to say that the precedent cited by petitioners appears inapposite—the role of joint tortfeasors in a mass tort situation is unlike that of a corporate guarantor[15], and the claims of Internal Revenue Service have a statutory basis not available to the tort victims[16]. Moreover, in none of the cases cited was there a judicial determination (as here) that the debtor's funds were adequate to satisfy the creditors in full.

From a practical standpoint, in the context of this case your *amicus curiae* would respectfully suggest that the time for esoteric legal wrangling over the nuances of statutory interpretation of the bankruptcy code has long since passed. For reasons of fact, the issue seems moot or speculative in this case.

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[15]*See Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982); and *Underhill v. Royal* 769 F.2d 1426 (9th Cir. 1985).

[16]*See United States v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir. 1986).

It is certainly significant to note that in more than 9,000 lawsuits brought in state and federal courts of the United States prior to institution of the bankruptcy in 1985, not a single verdict was rendered against *any* of the individuals or entities now claimed to be joint tortfeasors with Robins. Moreover, the voluminous record of the district court itself reflecting often-weekly hearings over a period of three years fails to reflect a shred of substantial evidence bearing on the issue of liability of any of the alleged third-party tortfeasors. In the petition for certiorari itself, no facts are suggested either within or *dehors* the record of this case bearing on the supposed liability of any third parties.

Therefore, even should the Court find some abstract merit in the legal argument advanced by petitioners, that the bankruptcy code generally should be construed to permit creditors to recover from non-bankrupt parties sharing in a joint liability, this is certainly not the case to test or resolve that abstract issue in the situation of mass tort liabilities. The record is devoid of evidence of the identity of any such third parties, the nature and extent of their supposed liabilities, or the impact of perfection of such third-party claims on rehabilitation of the debtor. Absent evidence that petitioners will suffer harm from their inability to pursue third-party liabilities, the Court should not jeopardize a good plan of reorganization to indulge idle consideration of academic issues.[17]

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[17]This is particularly true since the plan expressly provides a source for virtually unlimited additional funds if the trust is exhausted, should the Court reverse the limitation of Aetna's liability in *Anderson v. Aetna*, No. 442. See *supra*, Note 6.

CONCLUSION

Petitioners' genuine issue — adequacy of the fund — is not pressed for appeal, and the issue presented is abstract and shapeless without definition in this record. More importantly, the very grant of certiorari would render the issue moot because it would destroy the plan.

The plan deserves a life; it has had the consistent support of a lopsided majority of each class of affected parties. A tiny minority of dissidents should not be permitted to drain this carefully wrought program of its blood, or to hold hostage the will and the benefit of the majority who have waited years for recompense.

For the reasons indicated, the petition for certiorari should be denied.

Respectfully submitted,

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